

ORIGINAL  
RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAR 26 1993  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM DOCKET NO. 93-26
SPECTRUM BROADCASTING CO.	)	File No. BPH-911031MC
STEVEN L. GRADICK	)	File No. BPH-911031MD
TERRY C. JENKS	)	File No. BPH-911031MF
For Construction Permit for a	)	
New FM Station on Channel 288A	)	
in Bowdon, Georgia	)	

TO: The Honorable Richard L. Sippel  
Administrative Law Judge

**MOTION TO MODIFY ISSUES**

As provided for in §1.229(b)(1) of the Commission's Rules, Steven L. Gradick ("Gradick"), by his attorneys moves that the issues in this proceeding as specified in the Hearing Designation Order, DA 93-122, released February 24, 1993, be modified to condition any grant to Terry C. Jenks ("Jenks") on the outcome of pending proceedings before the FCC.

In support thereof, the following is respectfully shown:

There is presently before the Commission a Petition for Reconsideration of the Order allocating Channel 288A to Bowdon, Georgia, MM Docket No. 90-309, in which Design Media, Inc. ("DMI") alleges that Terry Jenks ("Jenks"),

No. of Copies rec'd  
List A B C D E

*CHB*

Gleemer Smith and Dallas M. Tarkenton have acted improperly before the Commission with respect to this rulemaking. Specifically, DMI alleges that Jenks is a front for Tarkenton and Smith and that he filed a mala fide counter proposal to allot Channel 288A to Bowdon, Georgia in order to (1) prevent DMI from upgrading station WQUL-FM Griffin, Georgia, or (2) force DMI to sell its station WQUL to Tarkenton for a price lower than the station's market value. Copy of petition attached as Exhibit 1.

In addition, a Request for Commission Inquiry has been filed, pursuant to 47 U.S.C. §403, asking the Commission to investigate alleged abuses of the Commission's process in MM Docket No. 90-309 by Terry Jenks, Gleemer Lee Smith and Dallas M. Tarkenton. This Request for Inquiry was filed September 26, 1991 by Design Media Inc. ("DMI"), and is presently pending before the Commission. The Request for Inquiry is premised upon the same conduct that was alleged in the Petition for Reconsideration.

The allegations contained in the Petition for Reconsideration are serious. If the Commission acts favorably on the Petition for Reconsideration, it would have to make findings adverse to Mr. Jenks. Accordingly, if the Commission should institute an investigation as requested and it is determined that the allegations made with respect to Mr. Jenks and others were true, this likewise would cast serious doubt on the qualifications of Jenks to be a Commission licensee.

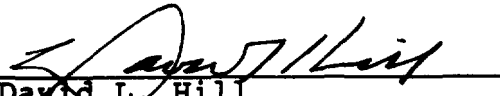
It is recognized that these matters are pending and that there have been no determinations concerning the sufficiency of the allegations or the legal efficacy of the arguments for reconsideration. Gradiak submits that the

abuses of the Commission's process in MM Docket No. 90-309  
by Terry C. Jenks and others. <sup>1/</sup>

Respectfully submitted,

STEVEN L. GRADICK

By:

  
David L. Hill  
Audrey P. Rasmussen  
His Attorneys

O'Connor & Hannan  
1919 Pennsylvania Avenue, N.W.  
Suite 800  
Washington, D.C. 20006  
(202) 887-1400

Dated: March 26, 1993

3693h

---

<sup>1/</sup> Official notice may be taken of the allegations made herein  
since they are premised upon filings and matters in MM  
Docket No. 90-309 now pending before the Commission.

**EXHIBIT 1**

RECEIVED

SEP 19 1991

Before the  
Federal Communications Commission  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In the Matter of )

Amendment of Section 73.202(b) )

MM Docket No. 90-309

Table of Allotments, )  
FM Broadcast Stations )  
(Griffin, Hogansville, Sparta )  
and Bowdon, Georgia) )

RM-7097  
RM-7310  
RM-7488

DUPLICATE  
FILE

To: Chief, Allocations Branch  
Mass Media Bureau

PETITION FOR RECONSIDERATION

Design Media, Inc.

David Tillotson  
James S. Blitz  
ARENT FOX KINTNER PLOTKIN  
& KAHN  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5339  
Telephone: (202) 857-6022

September 19, 1991

## TABLE OF CONTENTS

### PETITION FOR RECONSIDERATION

TABLE OF CONTENTS.....	i
SUMMARY.....	ii
A. BACKGROUND.....	2
B. JENKS' COUNTERPROPOSAL WAS DESIGNED TO ABUSE THE COMMISSION'S PROCESSES AND SHOULD BE DISMISSED.....	3
(i) The Interconnected Radio Interests Of Smith And The Tarkentons.....	7
(ii) Tarkenton's Threat To File A Blocking Counterproposal.....	8
(iii) Tarkenton's Unsolicited Offer For Design's Stations.....	10
(iv) Other Evidence Of Abuse Of The Commission's Processes By Tarkenton.....	10
(v) Summary And Conclusion.....	13
C. THE COMMISSION CAN SATISFY ALL PARTIES BY ALLOTING CHANNEL 223A TO BOWDON.....	17
D. CONCLUSION.....	22

## SUMMARY

Design Media, Inc. ("Design"), licensee of WQUL-FM, Griffin, Georgia, petitions for reconsideration of the "Report and Order," denying Petitions for Rulemaking filed by Design and Alexander Mitchell Communications Corporation.

After the closing of the pleading cycle preceding the issuance of the Order, Design obtained additional information raising serious questions concerning the bona fides of the counterproposal filed in this proceeding by Terry C. Jenks ("Jenks"). This evidence shows that Jenks' intention in pursuing the Bowdon allotment was not to further a personal interest in obtaining the right to operate a radio station, but to assist a friend in impeding Design's efforts to upgrade WQUL.

In a September 22, 1990 meeting between Jenks and a consultant retained by a previous party to this proceeding, Jenks admitted that he had filed his counterproposal at the suggestion of a "friend" in the Bowdon area. In a subsequent telephone conversation, Jenks identified the "friend" who had suggested that he file his counterproposal as Gleemer Lee Smith ("Smith"), a Carrollton, Georgia attorney.

The connection between Jenks' counterproposal and Smith provides the crucial link in a chain of facts which, taken together, establish a prima facie case that Jenks' counterproposal was not filed for the purpose of obtaining a

channel allotment at Bowdon that Jenks could apply for, but rather, was filed to aid and abet Smith, and Smith's business partner, Dallas M. Tarkenton ("Tarkenton") in their efforts to prevent Design from upgrading WQUL's facilities and/or to force Design to sell WQUL to Tarkenton at a low price relative to its actual value. The other facts in this chain of proof are:

- (i) At the time Jenks filed his counterproposal, Smith and Tarkenton were partners in the ownership of Station WBTR-FM, Carrollton, Georgia which would receive direct competition from a station operating on the channel that Jenks proposed for Bowdon and Tarkenton and his sons were owners of and applicants for other stations in the Atlanta area which would compete with WQUL, especially if WQUL were upgraded to C3 status;
- (ii) prior to the filing of Jenks' counterproposal, Tarkenton had called a Design principal and had threatened to file a counterproposal that would block WQUL's upgrade unless Design paid him to refrain from doing so;
- (iii) after Bowdon Broadcaster's withdrew its counterproposal, and before the Commission acted in this proceeding, Tarkenton made an unsolicited offer to purchase Design's stations for a price that was far less than they would be worth if WQUL were upgraded to C3; and
- (iv) Tarkenton has a history of using "straws" to file for, acquire and own stations in the Atlanta area.

Design has presented the Commission with evidence that its processes are being abused by a party with the motive to do so and a history of questionable use of those

processes. The Commission should address the situation and dismiss Jenks' counterproposal in this proceeding, rather than wait for further abuses of its processes and allegations that it ignored warning signs of a serious problem.

If the Commission chooses not to dismiss Jenks' counterproposal for the reasons described above, it can still accommodate all parties to this proceeding by adopting the alternative proposal Design previously presented to the Commission, under which the Commission would have allotted Channel 223A to Bowdon, rather than Channel 288A. This alternative proposal would satisfy all parties to this proceeding by enabling them to effectuate their proposals to initiate or improve service to the public.

Nothing in the Second Report and Order in MM Docket No. 88-275 or elsewhere in Commission precedent compels the result of separating a counterproposal from the underlying proposal to which it responds for purposes of applying the new spacing rules. It would clearly be more reasonable and to consider all parties to a proceeding under the same spacing rules, than to apply different rules to different parties, depending on when they entered the proceeding.

Moreover, the recent decision in Gosnell and Osceola, Arkansas, DA 91-920, MM Docket No. 87-619, released July 23, 1991, wherein the old spacing rules were used as a basis for

assigning a Class A channel to Osceola, Arkansas in order to resolve conflicting allocations proposals, provides a model, and an apt precedent, for accommodating all proposals in this proceeding.

RECEIVED

SEP 19 1991

Before the  
Federal Communications Commission  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
Amendment of Section 73.202(b) ) MM Docket No. 90-309  
 )  
Table of Allotments, ) RM-7097  
FM Broadcast Stations ) RM-7310  
(Griffin, Hogansville, Sparta ) RM-7488  
and Bowdon, Georgia) )  
  
To: Chief, Allocations Branch  
Mass Media Bureau

PETITION FOR RECONSIDERATION

Design Media, Inc. ("Design"), licensee of WQUL-FM, Griffin, Georgia, by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 CFR § 1.429, hereby petitions for reconsideration of the "Report and Order," DA 91-987, in the above-captioned proceeding, released August 14, 1991 ("Order"), denying Petitions for Rulemaking filed by Design and Alexander Mitchell Communications Corporation ("AMCC"). In support thereof, the following is shown.

After the closing of the pleading cycle preceding the issuance of the Order, Design obtained additional information raising serious questions concerning the bona fides of the counterproposal filed in this proceeding by Terry C. Jenks ("Jenks"). Design could not have learned of this new information through the exercise of ordinary diligence prior to this time, since such information is based on the declaration of Michael Bergner ("Bergner"), a media broker

who was retained by Bowdon Broadcasters, Inc. ("Bowdon"), a competing party in this proceeding until it withdrew its counterproposal on October 3, 1990. Bergner has only now agreed to provide Design with a written declaration containing evidence relevant to the bona fides of the Jenks counterproposal.

A. BACKGROUND

By way of background, this proceeding involves two inter-related petitions for rulemaking: the petition of Design to upgrade Station WQUL-FM (formerly WKEU-FM), Griffin, Georgia from Channel 249A to Channel 248C3, and the petition of Alexander Mitchell Communications Corporation ("AMCC") to upgrade Station WSKS(FM), Sparta, Georgia, from Channel 249A to Channel 249C3, which proposal is wholly dependent on implementation of the Griffin upgrade. The adoption of these proposals requires the substitution of Channel 288A for Channel 248A at Hogansville, Georgia.<sup>1/</sup> Rather than having Channel 288A used as a substitute for Channel 248A at Hogansville, Bowdon counter-proposed that Channel 288A be allotted to Bowdon, Georgia. Jenks filed a similar counterproposal, which was accepted as comments supporting Bowdon's proposal. See Order at fn. 5.

---

<sup>1/</sup> On February 28, 1991, ALJ Edward J. Kuhlman awarded T. Wood and Associates, Inc. a construction permit for a new station on Channel 248A at Hogansville, conditioned on the outcome of the instant proceeding. Memorandum Opinion and Order, FCC 91M-791, MM Docket No. 90-52.

On August 14, 1991, the Allocations Branch issued its Order denying Design's and AMCC's petitions for rulemaking and granting Jenks' counterproposal to allot Channel 288A to Bowdon, Georgia. In so doing, the Branch disregarded Design's assertion that Jenks' counterproposal was filed only to impede the Design and AMCC proposals in a manner calculated to obstruct and abuse the Commission's administrative processes. See Order at fn. 15 and Design's Supplemental Reply Comments. The Branch also declined to adopt Design's alternative proposal which would have resolved this conflict, and satisfied all parties, by allotting Bowdon Channel 223A rather than Channel 288A. The Branch explained that Design's alternative Bowdon proposal would be short-spaced to existing allotments, based on the new spacing rules adopted in the Second Report and Order in MM Docket No. 88-275, 4 FCC Rcd 6375 (1989), and the Branch had to rely on those spacing rules in resolving this proceeding. See Order at fn. 11 and Design's Reply Comments.

B. JENKS' COUNTERPROPOSAL WAS DESIGNED TO ABUSE THE COMMISSION'S PROCESSES AND SHOULD BE DISMISSED.

Newly discovered evidence shows that Jenks' intention in pursuing the Bowdon allotment was not to further a personal interest in obtaining the right to operate a radio station, but to assist a friend in impeding Design's efforts to upgrade WQUL. This newly discovered evidence is set out in the Declaration of Michael Bergner attached as Exhibit A

hereto. Bergner is a professional radio station broker who had been retained by Bowdon in September, 1990, to help resolve the instant proceeding. In the course of performing this function, Bergner uncovered information casting doubt on Jenks' credibility and intention to construct and operate a station in Bowdon. Bergner never presented the results of his investigation to the Commission, since Bowdon withdrew from this proceeding before Bergner had the opportunity to do so.<sup>2/</sup>

According to Bergner, Bowdon and other parties to the rulemaking attempted to contact Jenks to determine whether, and on what terms, Jenks would dismiss his counterproposal. After Jenks did not respond to efforts to contact him by mail at his Louisville address, and it was determined that his telephone number was unlisted, Bergner was asked to go to Louisville to speak with Jenks face-to-face and see whether he could persuade Jenks to accept reasonable terms for the dismissal of his counterproposal.

---

<sup>2/</sup> Bergner's declaration is admissible in this proceeding, since it contradicts Jenks' statements that, if his counter-proposal is accepted, he "will promptly file an application for a new FM station at Bowdon, Georgia," Jenks' "Comments and Counterproposal," filed August 7, 1990, and that it is his "intention to construct and operate the [Bowdon] station if he receives a grant." Jenks' "Response to Supplemental Reply Comments" at footnote 4, filed, December 28, 1990. It is a well-established exception to the hearsay rule that a party's admissions contradicting his earlier statement can be admitted into evidence. See 4 Wigmore, Evidence § 1048 (Chadbourn rev. 1972).

Bergner flew to Louisville on September 22, 1990. Arriving at Jenks home unannounced, Bergner found Jenks working in his garden. In response to Bergner's questioning, it became apparent that Jenks knew nothing about broadcasting or the FCC's rulemaking or application procedures. Jenks' admitted that he had filed his counterproposal at the suggestion of a "friend" in the Bowdon area and said he had no interest in settling the case or even discussing possible settlement terms. Bergner found it unusual that Jenks would be totally unwilling to discuss settlement, since Jenks was neither local to the Bowdon area nor a minority, and would therefore have no realistic expectation of winning a comparative hearing, if the Commission were to make the proposed channel allotment.<sup>3/</sup> In a subsequent telephone conversation between Bergner and Jenks, Jenks identified the "friend" who had suggested that he file his counterproposal as Gleemer Lee Smith ("Smith"), a Carrollton, Georgia attorney.

Bergner's Declaration linking Jenks' counterproposal to Smith provides the crucial link in a chain of facts which, taken together, establish a prima facie case that Jenks' counterproposal was not filed for the purpose of obtaining a

---

<sup>3/</sup> It is indisputable that, under the Commission's comparative criteria, Jenks would have virtually no chance of winning a comparative hearing for the Bowdon channel. Any applicant with any one of the following comparative attributes would beat him: (i) a local resident, (ii) a minority, or (iii) a woman.

channel allotment at Bowdon that Jenks could apply for, but rather, was filed to aid and abet Smith, and Smith's business partner, Dallas M. Tarkenton ("Tarkenton") in their efforts to prevent Design from upgrading WQUL's facilities and/or to force Design to sell WQUL to Tarkenton at a low price relative to its actual value. The other facts in this chain of proof, the relevance of which only became apparent by the revelation that it was Smith who suggested to Jenks that he file for the Bowdon allotment, are:

- (i) At the time Jenks filed his counterproposal, Smith and Tarkenton were partners in the ownership of Station WBTR-FM, Carrollton, Georgia which would receive direct competition

(i) The Interconnected Radio Interests Of Smith And The Tarkentons

At the time Jenks filed his counterproposal for Bowdon, Smith was a co-owner with Tarkenton of Station WBTR-FM, Carrollton, Georgia and Smith was also the co-owner with Tarkenton's son, Dallas M. Tarkenton, III, of Stations WMKJ (FM) and WCOH(AM), Newnan, Georgia.<sup>4/</sup> Additionally, at the time the counterproposal was filed, Tarkenton was the owner of Station WJGA(FM), Jackson, Georgia, and Tarkenton's son, Stephen, was an applicant for a new FM station in Zebulon, Georgia (BPH-900417MU). Attached as Exhibit B hereto is a Technical Statement, Exhibit 2 of which is a map reflecting that Stations WMKJ(FM) and WJGA(FM) and the station in Zebulon for which Tarkenton's son Stephen was an applicant would compete directly with WQUL for audience and revenues in the Atlanta radio market if WQUL were upgraded to Class C3.

Moreover, Smith has not only been in business as a partner of the Tarkentons, he is apparently involved in the Tarkentons' broadcast interests in other capacities, perhaps even as their attorney. The Commission's records for WMKJ-FM disclose that Smith was named as the person to whom the Commission should send notices and correspondence concerning the station. See BALH-900306GG. Moreover, Bergner

---

<sup>4/</sup> The General Manager of WMKJ-FM is Stephen Tarkenton, another of Tarkenton's sons. Broadcasting Yearbook, 1991, B-86. The Station is also attempting to relocate its transmitter to Peachtree City, Georgia. MM Docket 90-138, 55 FR 11411 (March 28, 1990).

discovered a hint of the close relationship between Smith and Tarkenton by telephoning Smith's office in Carrollton and asking to speak with Tarkenton. The receptionist answering the telephone responded that Tarkenton had left the office "just a few minutes ago" and offered to take a message for him. See Exhibit A.

(ii) Tarkenton's Threat To File A Blocking Counterproposal

After Design filed its petition for rulemaking in this proceeding, Tarkenton contacted Bolton by phone and threatened to block Design's petition unless he was paid off. Tarkenton initially attempted to reach Bolton at 9:55 a.m. on January 30, 1990, leaving a message that he "was very interested in talking to" Bolton. Bolton returned Tarkenton's call at approximately 11:00 that morning. Tarkenton told Bolton that the purpose of his telephone call was to ascertain whether he could work with Design, and make some money for himself, in return for his cooperation in connection with Design's upgrade proposal. Specifically, Tarkenton said he could file a proposal to use 105.5 MHz, the frequency Design had proposed to substitute at Hogansville, in a town not presently served by any station and that the filing of such a proposal would effectively block Design's proposed upgrade. Tarkenton said he had not told any of the other Hogansville applicants about the possibility of blocking Design's upgrade and he doubted any of them would think of the possibility on their own. However, Tarkenton

said, for a price he would not interfere with Design's efforts to upgrade its facilities. See Declaration of Leonard Bolton attached as Exhibit C hereto.

In the course of the conversation, Tarkenton also stated that he had no desire to serve any particular community, but rather, "was in it [presumably referring to the application process] for the money." Tarkenton also said that he had been involved in a lot of rulemaking proceedings and had made money in every one. Bolton immediately rejected Tarkenton's suggestion, interpreting it as a blatant attempt to extort money in return for Tarkenton's refraining from filing a counterproposal to block Design's proposed upgrade. Bolton then advised Design's engineering consultant and FCC counsel of the substance of the call and wrote a memorandum to the file memorializing the substance of the telephone

for a cash payment of any amount. See Design's "Supplemental Reply Comments" filed September 28, 1990.

(iii) Tarkenton's Unsolicited Offer For Design's Stations

After Bowdon withdrew its counterproposal, Design received an unsolicited offer to purchase WQUL and its sister AM station for \$2.3 million from Dallas Tarkenton, through media broker Robert Thornton. See Exhibit D. The \$2.3 million offer which was made without the benefit of any information concerning the financial performance of the stations was exactly the amount Design had paid to acquire the stations in 1986. At the time this unsolicited offer was made, the stations were worth only approximately \$1.6 million using the standard industry formula for calculating value of eight times cash flow. However, an appraisal by a recognized broadcast appraiser established that the value of the stations, if Design were able to upgrade its facilities, would exceed \$5 million. See Exhibit D.

(iv) Other Evidence Of Abuse Of The Commission's Processes By Tarkenton

There is abundant evidence that Tarkenton has previously manipulated the Commission's processes by using other parties as a "front" for his own broadcast applications. There is proof that Tarkenton was the undisclosed party-in-interest behind his sons' FCC applications, including evidence that he even forged his

sons' signatures on their FCC applications and the FCC filings.

It appears that Tarkenton is the moving party behind, and the real party-in-interest in, applications filed by, and stations owned by, his sons. Exhibit E hereto is a Declaration from a handwriting expert, Karl Schaffenberger, which establishes that Stephen Tarkenton's application for a new FM station in Lafayette, Florida, (BPH-870720MU) and several amendments thereto, were not signed by Stephen Tarkenton and were "in all probability, by the hand of Dallas M. Tarkenton." Mr. Schaffenberger's Declaration also establishes that the signatures on Christopher Tarkenton's application for a new FM station in Hogansville, Georgia (BPH-880601MX) and amendments thereto were most likely signed by someone other than Christopher Tarkenton and that signatures on applications and ownership reports which purport to be by Dallas M. Tarkenton, III, are so replete with inconsistencies as to make it doubtful that the signatures were made by the same person.<sup>5/</sup>

There are additional indications that Dallas M. Tarkenton is the moving party behind the applications his sons have filed and the stations they have owned. These indications include:

---

<sup>5/</sup> Attached as Exhibit F hereto is a listing of the FCC documents, and copies of the signature pages from those documents, which Mr. Schaffenberger used in his analysis.

1. Dallas Tarkenton was the undisclosed party controlling his son Christopher's application for a new FM station in Hogansville, Georgia. The ALJ in that case found that Tarkenton had "routinely acted for the applicant, if not solely" in negotiating for the site specified in Christopher's application and directed the senior Tarkenton to testify at the hearing. Memorandum Opinion and Order. FCC

3. Many of the Tarkentons' FCC applications use the same mailing address. Despite the fact that Tarkenton purportedly sold WMKJ-FM and WCOH(AM), Newnan, to Dallas M. Tarkenton III in 1985,<sup>8/</sup> the stations continue to operate from the senior Tarkenton's office in Athens, Georgia. See Ownership Reports filed for WMKJ-FM on November 29, 1990 and for WCOH(AM) on November 28, 1990.

4. Two recent letters filed at the Commission by

threat to block Design's upgrade to Jenks' Bowdon counterproposal. Jenks apparently filed his counterproposal at Smith's request, thereby carrying through on Tarkenton's threat file a counterproposal to block Design's upgrade. Jenks was unwilling to discuss withdrawing the counterproposal, because his actions were being controlled by Tarkenton, whose goal of blocking Design's upgrade would further the market power Tarkenton and his sons hold in the radio market in Atlanta's southern suburbs.

Moreover, Tarkenton's high purchase offer for Design's stations is perfectly understandable in this context. If Jenks had filed his counterproposal at Tarkenton's behest, he would also dismiss it if Tarkenton so requested. thereby clearing the way for Design to receive the